In the Supreme Court of the United States

October Term, 1977

No. 77-388

STATE OF WASHINGTON; COUNTY OF YAKIMA; DIXY LEE RAY as Governor of the State of Washington and individually; SLADE GORTON, as Attorney General of the State of Washington and individually; LES CONRAD, GRAHAM TOLLEFSON, and CHARLES RICH as County Commissioners and individually,

Appellants,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Appellee.

MOTION TO AFFIRM

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Appellee, hereinafter called "Yakima Nation", pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the April 29, 1977 decision and the final judgment of the Court of Appeals for the Ninth Circuit be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

QUESTION PRESENTED

Whether the Court of Appeals decision of April 29, 1977 warrants further consideration by this Court.

STATEMENT OF THE CASE

Yakima Nation objects to Washington's Statement of The Case in that it omits certain pertinent facts essential to a full and accurate statement, and without which the Statement is strongly biased in Washington's favor.

Yakima Nation's Reservation is a checkerboard of fee owned and non-fee owned land. In spite of the provisions of the Enabling Act under which Washington became a member of the Union and a disclaimer of jurisdiction over Indian lands contained in Article XXVI of its Constitution, in 1963 Washington unilaterally assumed partial geographic jurisdiction and partial subject matter jurisdiction within the Yakima Indian Reservation.

The effect of Washington's partial assumption is to impose upon Yakima Nation's Reservation a Washington Law Enforcement pattern that varies from tract to tract depending upon the title to the particular parcel of land and from crime to crime depending upon whether the crime was one of the categories over which Washington had assumed partial jurisdiction. Yakimas, under said Washington law enforcement pattern, have no effective law enforcement on their reservation. Washington acknowledges that reality as does the

Court of Appeals for the Ninth Circuit (Washington Appendix C, Jurisdictional Statement p. 54). In spite of the increase of crime on the Yakima Reservation (Tr. 221, 234), Washington's partial assumption of jurisdiction has resulted in the decline of both felony and misdemeanor arrests on the rural portions of the Yakima Nation's Reservation where most of the Yakimas reside. In 1963, there were 46 felony arrests on this portion of the reservation; in 1971, Washington made 2. In 1963, there were 17 misdemeanor arrests on that portion of the reservation, in 1971 Washington made 4. (Plaintiff's Exhibit 56). Yakima County's clearance rate and amount of coverage is below national and other guidelines. (Defendant's Exhibit 104, Tr. 124). The Yakima Reservation occupies 46.4% of the land encompassed by Yakima County. Reservation residents constitute almost half of the rural population of the county and 80% of Yakima Nation's members live in this rural lower valley portion of the county. No Yakima County Sheriff's office or Washington State Patrol office exists on the reservation. Of the 29 deputy sheriffs assigned to work in the field, only two were assigned to reservation patrol (Washington's Appendex C, Jurisdictional Statement p. 54). The Yakima Sheriff and the Director of the County Juvenile Department have said that Washington cannot do a good job with juveniles when it has no jurisdiction over parents and the Sheriff stated that fragmented jurisdic-

tion hampered police work in other law enforcement areas as well. (Washington's Apprendix C, p. 54, Jurisdictional Statement; Tr. 123, 124, 139, 1972, 167, 168, 174-176). Yakima County, which under state law has the basic burden of law enforcement, has protested that the lack of funds prohibit any further assistance. The legislature has failed to provide Yakima County with relief. (Tr. 64, 279-381, 117). Much of this is because the Washington State taxing pattern does not provide rural areas with funding on a parity with urban areas. (Plaintiff's Exhibit 58, Tr. 43). Yakima County has also used one million dollars of its federal revenue sharing funds to reduce taxes rather than to fulfill the duties of law enforcement that Washington unilaterally assumed. (Tr. 43). Even if funds were available, a qualified expert testified that any reasonable system of law enforcement is impossible under Washington's checkerboard system. (Tr. 307-310). Over half of the Yakima Nation's reservation, for forest protection purposes, is open to state officials only on a permit basis. (Jurisdictional Statement, p. 13).

The Yakimas and the federal government are financially able to provide effective law enforcement on the Yakima Reservation. The Yakimas have a large, well trained police force which, together with the special officers of the Bureau of Indian Affairs and agents of the Federal Bureau of Investigation, is available to provide effective law enforcement on the Yakima Indian Reservation (Tr. 299). In addition, Washington law enforcement personnel are cross deputized so that they can make arrests for prosecution in federal and Tribal Court as they did before 1963. (Jurisdictional Statement p. 13).

The Yakima Nation has requested retrocession of state jurisdiction to enable the Yakimas to return to federal jurisdiction with federal assistance to allow them to work out their problems within the tribal structure. Washington, either does not have, or declines to use, resources to improve the situation, but has so far been unwilling or unable to relinquish jurisdiction. This lawsuit is a by-product of Washington's failure to provide services or retrocede jurisdiction in order that the Yakimas and the federal government could provide adequate protection (Washington's Appendix C, Jurisdictional Statement p. 54).

ARGUMENT

The April 29, 1977 decision of the Circuit Court of Appeals for the Ninth Circuit is plainly correct. The Yakima Nation contended below that Washington's unilateral assumption of jurisdiction is invalid because Washington did not comply with a statutory condition precedent to assumption imposed by Congress in P.L. 83-280 (Act of August 15, 1953, Ch. 505, 67 Stat. 588); that failure to repeal a constitutional disclaimer over Yakimas did not provide the Yakimas with constitutional due process; that the *Treaty with the Yaki-*

mas (12 Stat. 951), which provided that the Yakimas would be governed by their own laws, required tribal consent; that the unilateral partial assumption of jurisdiction by Washington is not authorized by PL 280; that even if unilateral partial assumption by Washington was authorized that the State partial assumption statute is so indefinite, in its listed eight categories of partial subject matter assumed, that it does not meet constitutional standards; that Washington's law enforcement pattern does not meet constitutional standards of due process and/or equal protection in pattern or practice; and that in the alternative, the Yakima Nation has concurrent jurisdiction over offenses on the Yakima Indian Reservation. The Court of Appeals did not rule on all these contentions because it found that Washington's checkerboard jurisdictional structure based on a selection of land title, is the very kind of arbitrary choice forbidden by the Equal Protection Clause. The Court of Appeals thereby held that the portion of the Washington unilateral partial assumption statute that provided for partial geographic jurisdiction was void. The Yakima Nation contends that each and every one of its contentions contesting the validity of Washington's unilateral assumption statute support the Court of Appeal's judgment. However, the limited holding of the Court of Appeals provides such an unsubstantial question for this Court that it is not

appropriate that these questions be argued in this Motion to Dismiss.

The practical impact of the Circuit Court's decision is that it merely relieves Washington of a law enforcement burden she is unable or unwilling to carry and provides the Yakima Nation and the federal government with the opportunity to provide adequate law and order on the Yakima Indian Reservation. (Washington Appendix C, Jurisdictional Statement p. 56). The Yakima Nation is both able and willing to assume this responsibility without any more undue delay. The Court of Appeals decision is effectually limited to the Yakima Indian Reservation. Washington's unilateral partial assumption statute is unique. (Washington's Appendix C, Jurisdictional Statement, p. 59). Even within Washington, almost all Washington Indian Reservations would be unaffected because these reservations are all tribal land held in Tribal trust, have consented to full jurisdiction, or have had state jurisdiction retroceded. (Washington's Appendix C, Jurisdictional Statement p. 56). Even if affected, Washington Tribes may petition for full state assumption of jurisdiction if they, unlike the Yakimas, are unwilling or unable to provide protection to person and property. Under the Court of Appeals limited holding, State assumption with the Tribe's consent is still authorized. (R.C.W. 37.12.021, Washington's Appendix E). The effect of the Court of Appeals limited holding is to bring Washington within

the announced federal purpose in PL 90-284 (Act of April 11, 1968, Title IV, 82 Stat. 73) authorizing assumption only with tribal consent and P.L. 93-638 (Act of Jan. 4, 1975, 88 Stat. 2203) providing tribal self determination. This limited holding does not affect federal enclaves as Washington contends. Federal enclaves are within federal jurisdiction because they are declared federal enclaves and not because of the status of title to property under the Act of July 12, 1952 (18 USC §7, 66 Stat. 589) and the Act of June 25, 1948 (18 USC §13, 62 Stat. 686).

The decision of the Court of Appeals clearly followed this Court's direction. This Court has held that a pattern of checkerboard jurisdiction is "impractical", creates "many practical and legal conflicts" and that when a reservation is established, all tracts included within it remain a part of the reservation until such time as Congress declares these tracts not to be a part of the reservation. *Semour v. Superintendent*, 386 U.S. 351 (1962), *United States v. Clestine*, 215 U.S. 278 (1909), *DeCouteau v. District County Court*, 420 U.S. 425 (1975).

In its jurisdictional statement, Washington has proposed a new post-hoc rationalization for unequal protection. This rationalization is different from that proposed in the Circuit Court. (Washington's Appendix C, p. 34-35). No rationalization was presented by Washington in the District Court. Washington there

contended, that a fundamental right was not a jeopardy. The Attorney General's proposed legislative purpose is not apparent from the face of the statute and the Washington Legislature does not preserve statutory history capable of clarifying the objectives served by its legislative enactments. Certainly, this new rationalization is one that the Yakimas have not heard either in this case or when the Yakimas were protesting Washington's unilateral assumption before the Washington Legislature. There is no evidence in the record that will substantiate the Attorney General's guess as to Washington's legislative purpose.

The Court of Appeals in holding that the questioned statute failed to meet any formulation of the rational basis test did not need to determine whether this is a first-tier equal protection case. Yakima Nation contends that since unequal protection entails the most fundamental protection of property and life, places this case in a category where even a rational basis would not excuse the lack of equal protection. It is hard for Appellee to imagine a more fundamental right than to have one's person and property protected.

Be that as it may, the Court of Appeals decision was correct in holding that Washington's title-based classification fails to meet any formulization of the rational basis test. Because of their unique status, Indian tribes can be sorted out for special legislation by the federal government. *United States v. Antelope* ___ U.S. ___,

45 U.S.L.W. 4361, cited by Washington, follows this Court's holdings in that regard. However, *Antelope*, Supra, is not pertinent to this case. The Court of Appeals held that the distinction based on *land title* within the reservation has no rational basis, not that the distinction between Indians and non-Indians was the unconstitutional provision. In the April 29, 1977 decision, *Confederated Tribes and Bands of the Yakima Indian Nation vs. State of Washington*, the Court of Appeals said:

> "We can detect no rational connection between the stated purpose and the distinction based on land title within the reservation. The state's interest in enforcing criminal law is no less "fundamental" or "overriding" on non-fee lands than on fee lands. An overriding concern with and responsibility for public order necessarily embrace both, once the state undertakes to assume any jurisdiction over either. No showing has been or can be made that the happenstance of title holding is related in any way to the need by the land occupants for law enforcement. Moreover, no relationship has been suggested or shown between the interest and the ability of the state to provide law enforcement and the fee - non-fee status of the land within the reservation. This checkerboard jurisdictional structure based on a selection by land title is the 'very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . . .' *(Reed v. Reed*, 1971 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed. 2d 225). Accordingly, the partial territorial assumption of criminal jurisdiction under R.C.W. §37.12.010 is a denial of equal protection."
>
> (Washington Appendix A, Jurisdictional Statement, p. 35).

Even the Attorney General's post-hoc rationale

avails Washington naught. First, Washington proposed that the Yakima Nation had some choice as regards the amount of jurisdiction on trust lands. Is it judicially reasonable to suggest that the Yakima Nation abandon what limited safekeeping that they can provide under this "impractical" checkerboard system which on its face creates "many practical and legal conflicts" to rely solely and irrevocably on Washington who has shown neither the will nor the ability to respond to the needs of the Yakimas? We suggest the answer is in the negative. As this Court said in *Griffin v. Illinois*, 351 U.S. 12 (1955):

> "Law addresses itself to actualities."

As Judge Hufstedler and four other Court of Appeals judges pointed out, this partial jurisdiction statute cannot be made a full jurisdiction statute by merely calling it one (Washington's Appendix C, Jurisdictional Statement p. 49). Likewise, the Attorney General's post-hoc rationale, that the Washington Legislature limited its assumption to what the Washington Legislature believes to be "the real or diminished reservation" must fail from the plain reading of applicable Washington legislation. On the face of R.C.W. 37.12.010 (Washington's Appendix E, Jurisdictional Statement p. 68), the Legislature clearly directs:

> The State of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, *reservations*, country and lands. . . ." (Italics supplied).

The Washington Legislature then exempts from full assumption:

> "Indians when on their tribal lands or allotted lands within *an established Indian Reservation . . .*" (Italics supplied).

Clearly the Washington Legislature assumed jurisdiction on Indian Reservations, as federally established, and then exempted from this assumption, protection of person and property and all state jurisdiction but the eight undefined categories on non-fee lands. Such clear legislative intent conflicts with the Attorney General's post-hoc rationale.

Nor could Washington Legislature make a determination that the Yakima Reservation was limited to non-fee lands. This was tried once before by Washington. This Court has made very clear in *Seymour v. Superintendent*, 368 U.S. 351, 353 (1962), that the question of what lands are encompassed within an Indian Reservation is an *exclusive* federal function.

Likewise, this Court has made it clear that any special treatment of Indians must "be tied rationally to the *fullfillment* of Congress' unique obligations towards the Indians." *Morton v. Mancari*, 417 U.S. 552, 555, (1974) (Italics supplied). Here, even if there were a rational basis for a partial geographic assumption by the Washington legislature, it would still fail to satisfy the applicable rational basis test as it results in no gain to the Indians but instead unfairly and unconstitutionally results in the Yakimas not being provided with

equal protection of person and property by Washington. The Attorney General's post-hoc reasonable basis of *doing to* Indians as a unique, separate classification cannot be substituted for this Courts' *doing for* requirement.

Obviously, the Yakima Nation cannot be responsible for the claims made as to the effect of the Court of Appeals decision or the absurd and illogical results that the Attorney General claims will result from this Court's affirmation. Without taking time to refute these contentions, we merely suggest that those are not before this Court nor do we expect any Court will sustain such contentions. Washington's examples merely beg the question before us. The question here is whether the Yakima Nation and the federal government will have the opportunity to provide protection that Washington admittedly is unwilling or unable to assume. Washington's excuse that law enforcement coverage and expenditure is also as poor in other areas does not consider the unequal protection that results from Washington's unworkable checkerboard system.

Self serving statements by Washington's employees or officers will not disguise the record herein that shows that the Yakimas are not receiving adequate protection on their reservation and unequal protection on trust lands. Washington's hard to understand reasoning that since the officers patrolling the lower valley are longer in service than those in the upper valley, (Jurisdiction-

al Statement p. 12) cannot disguise Washington's admitted failure to provide protection of person and property.

The Circuit Court's holding is logical and within this Court's guidelines.

CONCLUSION

The decision of the Court of Appeals is correct and in conformity with this Court's decisions. The Court of Appeals judgment will be limited in its effect and will basically affect only the Yakima Reservation. Affirming the Court of Appeals will enable the federal government and the Yakimas to willingly provide adequate protection for life and property on the Yakima Reservation. Washington either does not have or declines to use resources to provide protection, and under the Washington pattern of checkerboard jurisdiction, cannot provide equal protection. This case has been pending for over six years and further delay is not warranted.

We respectfully submit, therefore, that Washington presents no substantial question for the decision of this Court, and that the judgment and decision of the Court of Appeals should be affirmed.

Respectfully submitted,
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HOVIS, COCKRILL & ROY
Counsel for Appellee.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 1977, three copies of this Motion to Dismiss were mailed postage paid, to Slade Gorton, Washington Attorney General, Malachy R. Murphy, Deputy Attorney General, Jeffrey C. Sullivan, Yakima County Prosecuting Attorney, Temple of Justice, Olympia, Washington 98504. I further certify that all parties required to be served have been served.

James B. Hovis,
Counsel for Appellee and
Member of the Bar of this Court.